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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

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THE PEOPLE,

Plaintiff and Respondent,

v.

CYNTHIA JENNIFER BISHOP,

Defendant and Appellant.

C079346; C079492

(Super. Ct. Nos. NCR90853;  
NCR92344)

Defendant Cynthia Jennifer Bishop entered negotiated pleas in two separate criminal cases in exchange for dismissal of additional charges and allegations and a grant of probation in each case. The trial court granted probation in both cases and imposed specified conditions, two of which defendant challenges on appeal as unconstitutionally vague and overbroad for lack of an express knowledge requirement.<sup>1</sup> We will affirm the judgments.

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<sup>1</sup> We granted appellant's motion for consolidation of the appeals.

## I. BACKGROUND

### A. *Appeal No. C079346; Case No. NCR90853*

On April 25, 2014, defendant was charged by amended criminal complaint in case No. NCR90853 with carrying a dirk or dagger (Pen. Code, § 21310—count 1),<sup>2</sup> receiving stolen property (§ 496, subd. (a)—count 2), misdemeanor possession of paraphernalia used for injecting or ingesting a controlled substance (Health & Saf. Code, § 11364.1, subd. (a)—count 3), and misdemeanor petty theft (§ 484, subd. (a)—count 4).

On June 3, 2014, defendant entered a negotiated plea of no contest to misdemeanor counts three and four pursuant to *People v. West* (1970) 3 Cal.3d 595. The parties stipulated to a factual basis for the plea.<sup>3</sup> The trial court placed defendant on 18 months of probation subject to specified terms and conditions, with credit for time served.

### B. *Appeal No. C079492; Case No. NCR92344*<sup>4</sup>

On October 4, 2014, the victim was given a ride to a house to collect some of her belongings. When she went inside the house, she was attacked by the tenant, who punched her several times and told defendant to “get her.” The victim ran outside where her friend was waiting for her in a truck. Defendant reached inside the truck through the window and struck the victim in the head and face with a large rock. Defendant also hit the truck with the rock, causing damage to the windshield.

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<sup>2</sup> Further undesignated statutory references are to the Penal Code.

<sup>3</sup> The record does not appear to include evidence from which we can deduce the facts underlying defendant’s plea in case No. NCR90853. However, the parties agree that an understanding of the facts is not necessary to our determination of this appeal.

<sup>4</sup> During the plea hearing, the parties stipulated that the facts contained in the police report provided the factual basis for her guilty pleas.

On November 5, 2014, defendant was charged by information in case No. NCR92344 with assault with a deadly weapon (§ 245, subd. (a)(1)—count 1), assault by means likely to produce great bodily injury (§ 245, subd. (a)(4)—count 2), misdemeanor vandalism (§ 594, subd. (a)—count 3), and possession of a device used for smoking a controlled substance (Health & Saf. Code, § 11364.1, subd. (a)(1)—count 4). The information alleged that, as to count two, defendant personally used a deadly and dangerous weapon. (§ 12022, subd. (b)(1).)

On December 19, 2014, defendant entered a negotiated plea of guilty to count one and admitted the weapon-use allegation in exchange for dismissal of the remaining charges and five years of formal probation with credit for time served.

On April 13, 2015, the trial court granted defendant five years of formal probation, subject to stipulated terms and conditions, with credit for time served. The court also found defendant in violation of probation in case No. NCR90853, reinstated probation in that case, and extended the original term to June 3, 2017.

Defendant filed timely notices of appeal in both cases. The trial court granted her request for a certificate of probable cause in each case.

## **II. DISCUSSION**

### **A. *Probation Condition 13***

Defendant contends probation condition 13 in case No. NCR92344 requiring that she “abstain absolutely from the use and possession of alcohol, and stay out of places where alcohol is the principal item for sale” is unconstitutionally vague. She claims the condition is not “sufficiently precise,” making it impossible for her to determine what places apply. She requests that the condition be modified to include an express knowledge requirement.

The People contend, and we concur, that no such modification is necessary in light of our opinion in *People v. Patel* (2011) 196 Cal.App.4th 956 (*Patel*). There, we held: “We construe every probation condition proscribing a probationer’s presence, possession,

association, or similar action to require the action be undertaken knowingly. It will no longer be necessary to seek a modification of a probation order that fails to expressly include such a scienter requirement.” (*Id.* at pp. 960-961.) The probation conditions at issue here fall squarely within the “presence, possession, association, or similar action” described in *Patel*.

Defendant acknowledges our decision in *Patel*, but nevertheless invites us to “consider her claims, despite *Patel*’s holding” because “probationers and probation officers cannot be expected to know about terms that are not listed either by the sentencing court or in the written probation conditions.” We decline to do so.

We note that defendant’s reply argument premised on *People v. Gaines* (2015) 242 Cal.App.4th 1035 (review granted February 17, 2016, S231723) is deemed forfeited for failure to raise it in her opening brief which, we also note, was filed over four months after *Gaines* was decided and two months after review was granted by the Supreme Court. A defendant may not deprive the Attorney General of the opportunity to respond by raising the argument for the first time in a reply brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) We generally decline to address an issue, in a summary manner or at all, when an appellant raises it for the first time in a reply brief without having raised it in the opening brief. (See *People v. Duff* (2014) 58 Cal.4th 527, 550, fn. 9; *People v. Harris* (2008) 43 Cal.4th 1269, 1290; *People v. Alvarez* (1996) 14 Cal.4th 155, 241, fn. 38.)

In any event, we acknowledge that a split of authority exists regarding whether probation conditions restricting a probationer’s presence, possession, association, or similar action must include an express scienter requirement, but adhere to our view that scienter is implied. (*Patel, supra*, 196 Cal.App.4th at pp. 960-961; but see *People v. Pirali* (2013) 217 Cal.App.4th 1341, 1351-1352 [declining to follow *Patel* and choosing to modify probation conditions on a case-by-case basis to make knowledge requirement explicit]; *People v. Moses* (2011) 199 Cal.App.4th 374, 381 [same].)

Here, probation condition 13 falls squarely within the “presence, possession, association, or similar action” described in *Patel*. (*Patel, supra*, 196 Cal.App.4th at pp. 960-961.) Thus, we construe the condition to require that the proscribed conduct be undertaken knowingly. Therefore, there is no need to modify the condition to include an express knowledge requirement because scienter is already implied.

*B. Probation Condition 14*

Defendant also challenges probation condition 14 in case No. NCR92344, which provides: “The defendant shall not use or possess any unlawful substance, nor any controlled drug except by prescription, and the defendant shall notify the probation officer within twenty-four hours of any such prescription. The defendant is not to use or possess marijuana without prior permission of the court. The defendant shall not associate with drug or illegal substance abusers or be in any place where illegal drugs are used or sold.” Defendant contends the condition is unconstitutionally vague and overbroad, and requests that it too be modified to include an express knowledge requirement.

Again, we concur with the People’s contention that no such modification is necessary in light of our opinion in *Patel*, as the condition falls squarely within the “presence, possession, association, or similar action” described in *Patel* and we construe the condition “to require the action be undertaken knowingly.” (*Patel, supra*, 196 Cal.App.4th at pp. 960-961.)

For the reasons discussed in part II, A of this opinion, we decline defendant’s invitation to consider her claim despite *Patel*’s holding.

### III. DISPOSITION

The judgments are affirmed.

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RENNER, J.

We concur:

/S/

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RAYE, P. J.

/S/

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MURRAY, J.